Lee Kong Weng v Erat Maju (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–443 OF 1992
MOHD HISHAMUDIN J
7 FEBRUARY 2008

Administrative Law — Exercise of administrative powers — Practice directions — Powers of Chief Judge to issue — Whether Chief Judge obliged to follow prescribed manner in issuing practice directions — Whether practice directions not issued in the prescribed manner invalid — Rules of the High Court 1980 O 92 r 3B

Civil Procedure — Practice direction — Validity of — Chief Judge not following prescribed procedure in issuing practice direction — Whether such practice direction valid — Whether Chief Judge obliged to obtain consent of Chief Justice before issuing a practice direction — Rules of the High Court 1980 O 92 r 3B

Civil Procedure — Practice Direction — Validity of — Whether practice directions could suspend the operation of provisions in the Rules of the High Court 1980 — Whether practice directions of superior status to the Rules of the High Court 1980

Civil Procedure — Striking out — Want of prosecution — Inordinate and unreasonable delay by plaintiff in prosecuting claim — No satisfactory explanation offered for such delay — Whether defendant prejudiced by such delay — Whether action ought to be struck out — Rules of the High Court 1980 O 25

The plaintiff filed his writ of summons and statement of claim on 29 June 1991. He filed a reply to the defendant's statement of defence on 23 January 1992. He then applied for summary judgment on 29 January 1992 which application was dismissed on 12 October 1995. The plaintiff appealed to the judge in chambers but the appeal was withdrawn on 21 March 1996. On 21 December 2004 the defendant filed an application under O 25 r 1(5) of the Rules of the High Court 1980 ('RHC') to strike out the plaintiff's suit for want of prosecution. The plaintiff then filed Form 63 for case management on 10 August 2005. When the defendant's application came up for hearing, the senior assistant registrar allowed the application. The plaintiff thus appealed. The plaintiff argued that the defendant could not make the

application under O 25 r 1(5) of the RHC as the operation of O 25 had been suspended by Practice Direction No 1 of 2001.

Held, dismissing the appeal with costs:

(1) It was clear that there had been a very long and unreasonable delay on the part of the plaintiff in prosecuting his claim. The plaintiff failed to give any satisfactory explanation for the very long delay, which would have prejudiced the defendant. In the instant case, the plaintiff ought to have filed the summons for directions on or before 21 April 2004. However, this was not done by the plaintiff (see paras 3, 5–6).

(2) The Practice Direction (No 1 of 2001) was invalid for two reasons. Firstly, a practice direction cannot as a matter of law suspend the operation of provisions in the RHC. A practice direction is not of a higher status or even of the same status to the RHC. It is subordinate to the RHC. Being a subordinate provision, in the absence of an enabling provision either in the Courts of Judicature Act 1964 or in the RHC itself, a practice direction can never suspend the operation of any of the provisions in the RHC. Secondly, the Chief Judge did not follow the prescribed procedure in issuing Practice Direction No 1 of 2001. Under O 92 r 3B, the Chief Judge needs only to consult the Chief Justice before issuing a practice direction. However here, instead of merely consulting the Chief Justice, the Chief Judge sought to obtain the consent of the Chief Justice (see paras 10–12).

(3) When an enabling law confers a power on an authority but prescribes the manner by which the power is to be exercised, then for the exercise of that power to be valid, the precise prescribed manner must be strictly adhered to by the authority conferred with the power. Since in the present case the prescribed manner of issuing practice directions had not been followed, Practice Direction No 1 of 2001 was invalid. Therefore, there was no suspension of O 25 of the RHC in force. Order 25 was still in operation and could be invoked by the defendant (see paras 13–14).

(4) Although the plaintiff had filed Form 63 for case management, this was done very late. Even then, he had failed to first file a notice of intention to proceed as required by O 3 r 6 of the RHC. This was another blatant disregard of the RHC (see para 15).

[Bahasa Malaysia summary

Plaintif telah memfailkan writ saman dan penyataan tuntutannya pada 29 Jun 1991. Dia telah memfailkan jawapan terhadap penyataan pembelaan

defendan pada 23 Januari 1992. Dia kemudian telah memohon untuk penghakiman terus pada 29 Januari 1992 yang mana permohonan telah ditolak pada 12 Oktober 1995. Plaintif telah merayu kepada hakim dalam kamar tetapi rayuan itu telah ditarik balik pada 21 Mac 1996. Pada 21 Disember 2004 defendan telah memfailkan satu permohonan di bawah A 25 k 1(5) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan guaman plaintif kerana ketiadaan pendakwaan. Plaintif kemudian telah memfailkan Borang 63 untuk pengurusan kes pada 10 Ogos 2005. Apabila permohonan defendan dihadapkan untuk perbicaraan, penolong kanan pendaftar telah membenarkan permohonan tersebut. Plaintif oleh itu telah merayu. Plaintif berhujah bahawa defendan tidak boleh membuat permohonan di bawah A 25 k 1(5) KMT kerana pelaksanaan A 25 telah digantung oleh Arahan Amalan No 1 Tahun 2001.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah jelas bahawa terdapat kelewatan yang berpanjangan dan tidak munasabah di pihak plaintif dalam membuat dakwaan terhadap tuntutannya. Plaintif gagal untuk memberikan apa-apa penjelasan yang memuaskan untuk kelewatan yang lama itu, yang akan memprejudiskan defendan. Dalam kes ini, plaintif patut telah memfailkan saman untuk arahan itu pada atau sebelum 21 April 2004. Walau bagaimanapun, ini tidak dilakukan oleh plaintif (lihat perenggan 3, 5–6).

(2) Arahan Amalan (No 1 Tahun 2001) tidak sah kerana dua sebab. Pertama, suatu arahan amalan tidak boleh dari segi undang-undang menggantung pelaksanaan peruntukan-peruntukan dalam KMT. Suatu arahan amalan tidak mempunyai status yang lebih tinggi ataupun yang sama dengan status KMT. Ia adalah lebih rendah daripada KMT. Oleh kerana ia merupakan peruntukan bawahan, dalam ketiadaan peruntukan yang memberikan bidang kuasa sama ada dalam Akta Mahkamah Kehakiman 1964 atau dalam KMT sendiri, arahan amalan tidak boleh digantung pelaksanaan mana-mana peruntukan dalam KMT. Kedua, Hakim Besar tidak mengikut prosedur yang ditetapkan dalam mengeluarkan Arahan Amalan No 1 Tahun 2001. Di bawah A 92 k 3B, Hakim Besar hanya perlu mendapat nasihat Ketua Hakim Negara sebelum mengeluarkan arahan amalan. Walau bagaimanapun di sini, sebalik hanya menasihati Ketua Hakim Negara, Hakim Besar telah memohon persetujuan Ketua Hakim Negara (lihat perenggan 10–12).

(3) Apabila peruntukan yang memberikan bidang kuasa memberikan kuasa ke atas pihak berkuasa tetapi menetapkan cara kuasa itu perlu digunakan, maka untuk penggunaan kuasa itu menjadi sah, cara

terperinci yang ditetapkan hendaklah dipatuhi oleh pihak berkuasa yang telah diberikan kuasa itu. Memandangkan dalam kes ini cara yang ditetapkan untuk mengeluarkan arahan amalan tidak diikut, Arahan Amalan No 1 Tahun 2001 adalah tidak sah. Oleh itu, tiada penggantungan A 25 KMT yang berkuat kuasa. Aturan 25 masih beroperasi dan boleh digunakan oleh defendan (lihat perenggan 13–14).

(4) Meskipun plaintif telah memfailkan Borang 63 untuk pengurusan kes, ini telah lewat dilakukan. Bahkan, dia telah gagal untuk terlebih dahulu memfailkan notis niat untuk bertindak seperti yang dikehendaki oleh A 3 k 6 KMT. Ini juga menunjukkan sikap tidak peduli terhadap KMT (lihat perenggan 15).]

Notes

For a case on validity of practice direction, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 5822.

For cases on practice directions, exercise of administrative powers generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 10–106.

For cases on want of prosecution, see 1 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6790–6794.

Legislation referred to

Courts of Judicature Act 1964
Rules of the High Court 1980 O 3 r 6, O 14, O 25, O 25 r 1, O 25 r 1(4), O 25 r 1(5), O 34, O 92 r 3B, Forms 46, 63

William Culas (Arokia with him) (Vincent N Nathan) for the plaintiff.
K Lopez (Kamaruddin & Partners) for the defendant.

Mohd Hishamudin J:

[1] Enclosure 56 is the plaintiff's appeal against the decision of the learned senior assistant registrar in allowing the defendant's application for the plaintiff's suit to be dismissed with costs for want of prosecution pursuant to O 25 r 1(5) and O 34 of the Rules of the High Court 1980 ('RHC'). I have dismissed the appeal with costs and I shall now give my grounds.

[2] I shall begin by setting out the chronology of events. The writ and statement of claim was filed on 29 June 1991. The statement of defence was filed on 31 December 1991. The reply to the statement of defence was filed on 23 January 1992. The plaintiff's O 14 summary judgment application was filed on 29 January 1992. The O 14 application was dismissed on 12 October 1995. The plaintiff appealed to the judge in chambers against the dismissal of the O 14 application but the appeal was withdrawn on 21 March 1996.

On 21 December 2004 the defendant filed the present application to strike out the plaintiff's suit for want of prosecution. On 10 August 2005 the plaintiff filed Form 63 for case management.

[3] In my judgment, from the above chronology of events it is clear that there has been a very long and unreasonable delay on the part of the plaintiff in prosecuting his claim. The writ and statement of claim was filed on 29 June 1991. Yet by 21 December 2004 the plaintiff was yet either to file the summons for direction (as required by O 25 r 1) or to file Form 63 for case management pursuant to O 34 of the RHC.

[4] Order 25 r 1(4) and (5) provides as follows:

(4) If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may do so or apply for an order to dismiss the action.

(5) On an application by a defendant to dismiss the action under para (4) the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

[5] To my mind the plaintiff has failed to give any satisfactory explanation for the very long delay. The defence is certainly prejudiced by this inordinate delay. Witnesses may not be able to be located; and even if the witnesses could be located, the likelihood is that they may not be able to recall the events clearly due to the long passage of time.

[6] According to O 25 r 1 of the RHC the plaintiff must within one month after the pleadings in the action are deemed to be closed, take out a summons in Form 46, that is to say, to file a summons for directions. The pleadings are deemed to be closed 14 days after the service of the plaintiff's reply on the defendant. However, in the present case there was an O 14 application which was subsequently withdrawn on 21 March 1996. Hence the plaintiff ought to have filed for summons for directions on or before 21 April 2004. But this was not done by the plaintiff.

[7] The plaintiff explains that the reason as to why he did not file for summons for directions was that he had misunderstood the dismissal of his O 14 application: he thought that when his O 14 application was dismissed the whole action had been dismissed. I find this explanation is difficult to believe. The plaintiff could not have been that ignorant, especially when he had had the benefit of the services of counsel at the time when his O 14 application was dismissed.

[8] The plaintiff in resisting the present defendant's application argues that the defendant cannot make this application pursuant to O 25 r 1(5) of the RHC as the operation of O 25 has been suspended by Practice Direction No 1 of 2001 issued by the Chief Judge (Malaya) pursuant to O 92 r 3B. Rule 3B reads:

> The Chief Judge after consulting the Chief Justice may issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of these rules, and those of the Subordinate Courts Rules 1980.

[9] Practice Directions No 1 of 2001 read:

> Y.A. Hakim/Pesuruhjaya Kehakiman
>
> Mahkamah Tinggi Malaya
>
> Timbalan Pendaftar
>
> Mahkamah Tinggi Malaya
>
> Pegawai Penyelidik/Penolong Kanan Pendaftar
>
> Mahkamah Tinggi Malaya
>
> ARAHAN AMALAN BIL. 1/2001
>
> PENANGGUHAN PEMAKAIAN ATURAN 25
>
> KAEDAH-KAEDAH MAHKAMAH TINGGI 1980
>
> Dengan hormatnya perkara di atas dirujuk.
>
> 2. Dimaklumkan bahawa hasil dari perbincangan dengan Y.A.-Y.A. Hakim dan Pesuruhjaya Kehakiman Mahkamah Tinggi di Persidangan Tahunan Majlis Hakim-Hakim 2001 mengenai pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980, Y.A.A. Hakim Besar Malaya telah mengambil maklum tentang keputusan mesyuarat yang telah bersetuju untuk menggantung pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980
>
> 3. Sehubungan itu Y.A.A. Hakim Besar Malaya mengarahkan supaya pemakaian Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980 digantung sehingga satu keputusan mengenai kajian terhadap aturan tersebut dibuat. Dengan penggantungan tersebut, ini bermakna Aturan 25 tidak lagi digunakan sebaliknya Aturan 34 Kaedah-Kaedah Mahkamah Tinggi 1980 hendaklah digunakan keseluruhannya di dalam pengurusan kes.
>
> 4. Bagi tujuan pemfailan notis untuk menghadiri pengurusan kes (pre-trial case management) Borang 63 yang baru hendaklah digunakan dan fee yang dikenakan bagi Borang 63 ialah sebanyak RM8 (Butiran 64 Appendix B Kaedah-Kaedah Mahkamah Tingi 1980).
>
> 5. Semua Pejabat Pendaftaran Mahkamah Tinggi Malaya dikehendaki tidak menerima pemfailan dokumen-dokumen di bawah Aturan 25 Kaedah-Kaedah Mahkamah Tinggi 1980 kecuali saman minta arahan yang berkaitan dengan pelelongan tanah di bawah seksyen 257 Kanun Tanah Negara 1965.

6. Arahan Y.A.A. Hakim Besar Malaya ini adalah dibuat dalam menjalankan kuasa-kuasa di bawah Aturan 92 Kaedah 3B Kaedah-Kaedah Mahkamah Tinggi 1980 setelah mendapat persetujuan Y.A.A. Ketua Hakim Negara dan berkuatkuasa mulai dari tarikh Arahan Amalan ini dikeluarkan.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

t.t.

(MAT ZARAAI BIN ALIAS)

Pendaftar

Mahkamah Tinggi Malaya

Kuala Lumpur

[10] In my judgment, and with the greatest respect, the above practice direction is invalid. I so hold for two reasons. Firstly, to my mind, a practice direction cannot as a matter of law suspend the operation of provisions of the RHC. A practice direction is not of a higher status or even of the same status in relation to the RHC. A practice direction is subordinate or subsidiary to the RHC. Being subordinate to the RHC, therefore, unless there is an enabling provision either in the Courts of Judicature Act 1964 or in the RHC itself, no practice direction can ever suspend the operation of any of the provisions of the RHC.

[11] Secondly, O 92 r 3B of the RHC prescribes the manner of exercising the power to issue practice directions by the Chief Judge. The power to issue practice directions is exercised by the Chief Judge after consulting the Chief Justice. The exact words used are:

after consulting the Chief Justice

[12] Thus the Chief Judge needs only to consult the Chief Justice. To 'consult' means to obtain the views of the Chief Justice and to respect and to give due consideration to the views; but the Chief Judge is not bound by the views given, and the Chief Justice must respect the legal position that he cannot impose his view on the Chief Judge. But in present case the Chief Judge, in the purported exercise of his powers, did not follow the prescribed procedure of consulting the Chief Justice. Instead of merely consulting the Chief Justice, he sought to obtain the consent of the Chief Justice; for para 6 of Practice Direction No 1 of 2001 states:

… setelah mendapat persetujuan YAA Ketua Hakim Negara.

[13] When an enabling law confers a power on an authority but prescribes the manner by which the power is to be exercised, then, for the exercise of that power to be valid, that precise manner as prescribed must be strictly adhered to by the authority that is conferred with the power. Since in the present case the prescribed manner of issuing the practice direction has not been followed, therefore, the practice direction is invalid.

[14] Since the practice direction is invalid, therefore, there is no suspension of O 25 in force; and this means that O 25 is still in operation and may be invoked by the defendant.

[15] The plaintiff also submits that he has filed in Form 63 for case management. But this filing of Form 63 was also done very late. It was only filed on 10 August 2005; whereas Form 63 and the case management procedure was introduced into the RHC in 2000, meaning that the plaintiff could and should have filed Form 63, if he had wanted to or had thought about it, in the year 2000. But the plaintiff did not. And even when, subsequently, he filed Form 63 in August 2005, the plaintiff had failed to file first a notice of intention to proceed as required by O 3 r 6 of the RHC. This is yet another blatant disregard of the RHC.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon